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5 DISTRICT COURT OF GUAM
6 TERRITORY OF GUAM
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8 NATHANIEL UNTALAN,
9 Plaintiff,

10 vs.

11 NISSAN MOTOR CORPORATION IN
12 GUAM,
13 Defendant.

) CIVIL CASE NO. 18-00015
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REPORT AND RECOMMENDATION
re Motion for Partial Summary Judgment
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14 On August 20, 2019, the court heard the Motion for Partial Summary Judgment filed by
15 Nissan Motor Corporation in Guam (Defendant) against Nathaniel Untalan (Plaintiff).

16 At the conclusion of the hearing, the court took the motion under advisement.

17 After having reviewed the memoranda in support and in opposition to the motion and the
18 reply thereto, the arguments by the parties, the court submits its decision in this Report and
19 Recommendation.

20 **BACKGROUND**

21 Plaintiff was hired by Nissan in July, 1997 as a Warehouse Person. He continued in that
22 capacity until 2007 when he was promoted to Assistant Parts Manager. As Assistant Parts
23 Manager, he had the duty “of assisting the Parts Manager, readings emails, checking up on
24 invoices, and following up on part orders and service repairs.” Plaintiff alleges that in 2013, his
25 hourly rate of employment with Nissan was \$3.12 and remained at that rate throughout
26 the period of his employment with Nissan.

27 In September, 2013, Plaintiff enlisted in the United States Air Force Reserve. Since his
28 enlistment, Plaintiff alleges that he received negative comments from his employer and his

loyalty to the company was questioned as well as his character as a manager. Eventually, he was forced to resign “due to issues regarding his 401k, health care, promotions, and an intolerable work environment that Nissan intentionally created” as a result of his enlistment.

On April 30, 2018, Plaintiff filed a two-count complaint against Defendant. In his complaint, Plaintiff alleges that:

Count I. Nissan violated his rights under Guam’s Fair Labor Standards Act because it never paid him a base rate of no less than \$8.25 when the said rate became effective on January 1, 2015. He continued to receive a base rate of \$3.12 per hour until his termination. Thus, Plaintiff alleges that he was never lawfully paid as an hourly employee or as a salaried employee and was exempt from the provisions of 22 G.C.A. § 3108.

Count II. Nissan violated his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) by: (A) Plaintiff’s denial of promotion; (B) Plaintiff’s Constructive Discharge; (C) Nissan’s willful and reckless violation of the rules and regulations of employees pension benefit plans under USERRA; and (D) Nissan’s failure to pay him health insurance premiums which were withheld from his regular wages and benefits.

DISCUSSION

Defendant has moved for partial summary judgment on three grounds. In its motion, it argues that:

1. Nissan is entitled to summary judgment because there was no violation of Guam’s Fair Labor Standards Act because Plaintiff was employed as a bona fide executive employee and paid on a salary of not less than \$455 per week.

2. Nissan is entitled to partial summary judgment because it did not wilfully or recklessly withhold employer contributions into Plaintiff’s 401K plan.

3. Nissan is entitled to summary judgment on the claim that Plaintiff is entitled to reimbursement for medical and dental premiums for the period of June 1, 2017 to July 31, 2017.

Summary Judgment: Violation of Guam’s Fair Labor Standards Act.

Defendant argues that the provisions of the Fair Labor Standards Act are inapplicable to Plaintiff since he was an executive employee of Defendant. As a bona fide executive employee

1 of Defendant, Plaintiff was exempt from the requirements of Guam's Fair Labor Standard Act.

2 In support thereof, Defendant cites 22 G.C.A. § 3108(b)(1), which provides:

3 Any employee who is employed in a bona fide executive capacity, which
4 is any employee who is compensated on a salary or fee basis at a rate of not
5 less than Four Hundred Fifty-five Dollars (\$455.00) per week and whose
6 primary duty is management of the enterprise where the employee is employed
7 or of a recognized department thereof; who customarily and regularly directs
the work of two (2) or more other employees; and who has the authority to hire
or fire other employees or whose suggestions and recommendations as to
hiring, firing, advancement, promotion, or any other change of status of
other employees are given particular weight.

8 Under the statute, an employee is exempt under the Guam Fair labor Standard Act if
9 (1) he is employed in a bona fide executive capacity earning a salary of not less than \$455 per
10 week and (2) is employed in a recognized department thereof; customarily and regularly directs
11 the work of two or more other employees; has the authority to hire or fire other employees or
12 whose suggestions and recommendations as to hiring, firing, advancement, promotion, or any
13 other change of status of other employees are given particular weight.

14 Thus, Defendant argues that Plaintiff was employed as a bona fide executive employee.
15 In support thereof, Defendant advises the court that Plaintiff was an Assistant Parts Manager
16 from 2007 until he resigned on September 7, 2017 earning the requisite salary under the statute.
17 In addition, Defendant provides the court with Plaintiff's deposition testimony which illustrates
18 his managerial duties.¹ The relevant deposition parts provide:

19 Q: In your own words, can you tell me exactly what your essential job duties were
20 throughout the years that you held that job position.

21 A: Process special orders, handle customers, of course, work on stock orders, oversaw
22 most of my Parts Advisors, monitor sales, keep an eye on telephones.

23 Q: How many people or how many employees were in the Parts Department?

24 A: We had approximately eight, ten.

25 Q: And so you said there were parts advisors?

26 A: Parts advisors.

27 Q: And what other titles were there?

28 A: Warehouse person.

Q: Okay. Anything else?

A: We had an inventory clerk off-island, an off-island inventory clerk.

Q: Okay. And you said that you oversaw parts advisors --

¹ Excerpt pages from the May 30, 2019 Deposition Transcript of Plaintiff are appended to Defendant's Concise Statement beginning at page 75 of ECF No. 23.

1 A: Yes, ma'am.

2 Q: -- correct? Did you also oversee the warehouse person?

3 A: Yes.

4 Q: And did you also oversee the inventory off-island clerk?

5 A: Yes.

6 Q: Okay. Did you direct them with regard to their job duties, meaning did you tell them
7 what to do or did you show them how to do things, things of that nature that an
8 assistant manager would do?

9 A: Yes.

10 Q: "Yes," okay. Now, with regard to these individuals, did you have the
11 authority to make any suggestions with regard to either promoting them or maybe
12 demoting them or maybe recommending them for certain raises or anything of that
13 nature?

14 A: Officially or --

15 Q: In your capacity as an Assistant Parts Manager.

16 A: As a Manager, I can always take care of my people and talk to the Parts Manager
17 or give him my opinion.

18 Q: And make those recommendations?

19 A: If he asks for it.

20 Q: Okay. As an Assistant Parts Manager, do you feel that your opinion regarding how
21 an individual was doing was given a certain amount of weight?

22 A: I would hope so.

23 Q: Have you had discussions [with the Parts Manager] before regarding promotions,
24 demotions?

25 A: When he asks my opinion.

26 Q: So he will defer to you?

27 A: He would ask, yes.

28 Q: One of the things that I wanted to also follow up on is when we were talking about
your job duties and your job description, did that also include doing performance
reviews for your Parts Advisors or anyone that you oversaw in the Parts Department?

A: Yes, Ma'am.

Q: So that was also part of your essential duties - -

A: Yes.

Q: -- to do the performance reviews?

A: We split it in half. It was me and the Manager.

Q: Oh, ok.

A: He asked for help, so he would make me do four and then he would take the rest
at his discretion.

Depo. Tr. Nathaniel B. Untalan, ECF No. 23 at 78-84.²

Based upon the foregoing, Defendant argues that Plaintiff was a bona fide executive
employee of Defendant when he was so employed because he regularly supervised eight to ten
individuals in the Parts Department; that his job description and managerial duties illustrated he

² For ease of reference, citations to excerpts of deposition transcripts shall refer to the
page numbers printed on the ECF footer.

1 had a leadership position within Defendant's employment; and that he made recommendations as
2 to hiring, firing, and promotions for the company.

3 Defendant next argues that Plaintiff was paid on a salary basis of not less than \$455 per
4 week.

5 Since Guam has no rules interpreting the statute, Defendant cites 29 CFR Part 541.600,
6 the federal regulation interpreting the Federal Fair Labor and Standard Act, for guidance. The
7 regulation provides:

8 (a) To qualify as an exempt executive, administrative or professional
9 employee under section 13(a)(1) of the Act, an employee must be compensated
10 on a salary basis at a rate of not less than \$455 per week (or \$380 per week, if
employed in American Samoa by employers other than the Federal Government),
exclusive of board, lodging or other facilities.

11 (b) The \$455 a week may be translated into equivalent amounts for periods longer
12 than one week. The requirement will be met if the employee is compensated
biweekly on a salary basis of \$910, semimonthly on a salary basis of \$985.83, or
13 monthly on a salary basis of \$1,971.66. However, the shortest period of payment
that will meet this compensation requirement is one week.

14 Mr. Arnel Bonto, Nissan's Controller, testified that pursuant to the Fair Labor Standards
15 Act, Plaintiff was considered an executive employee and was exempt from the minimum wage
16 requirements. *See* Depo. Tr. Arnel Bonto, ECF No. 23 at 91. When asked about Plaintiff's pay
17 structure, he indicated that Plaintiff's salary was comprised of his base pay plus commission and
18 bonuses. *Id.* at 100-01. He added that Plaintiff received a minimum of \$455 per week, *id.* at 91,
19 and to ensure that Nissan complied with this weekly salary requirement, Mr. Bonto personally
20 calculated Plaintiff's commissions, and then forwarded the commission calculation worksheet to
21 Linda Nieva, Nissan's Chief Accountant, for review and processing into the payroll system. *Id.* at
22 89 and 92-93.

23 At \$455 per week, Plaintiff should have earned a minimum of \$23,660 per year. *Id.* at 93.
24 During his deposition, Mr. Bonto reviewed Plaintiff's pay registers from 2007 to 2017 (*id.* at 94-
25 99 and Exhibit K) and confirmed that during those years, he earned more than \$23,660 per year,
26 as evidenced below:

27	2007 \$27,924.28	2013 \$49,567.28
28	2008 \$39,722.93	2014 \$36,364.06
	2009 \$42,591.36	2015 \$36,608.79

1 2010 \$46,628.21 2016 \$48,848.50

2 2011 \$44,242.11 2017 \$29,846.99

3 2012 \$49,093.84

4 Based upon the above, Defendant has moved for summary judgment based upon the
5 premise that Plaintiff is not covered under Guam's Fair Labor Standards Act.

6 Plaintiff has opposed the above motion.

7 In his opposition, *see* ECF No. 29, Plaintiff points out that his pay structure is calculated
8 based upon a percentage of the adjusted gross profit plus a base pay. In June, 2008, he received
9 notice that his revised pay plan would be based upon a 2% sales commission plus a \$5,000
10 annual base pay. Furthermore, Plaintiff states that in 2011, he was notified that his base pay was
11 increased to a new rate of \$500 per month (\$6,00 per year). *See* Opp'n at 2, ECF No. 29.

12 Plaintiff also states that on July 18, 2017, he was notified by Defendant that his pay plan was
13 calculated based upon 2% of adjusted gross profit plus a base pay of \$6,500 per year or \$270.84
14 per pay period. *Id.* at 6.

15 Citing 29 C.F.R. § 541.602(a), Plaintiff argues that the \$455 per week salary threshold
16 must be a fixed and predetermined amount rather than the "as long as he actually gets at least
17 \$455 each week ...and if he does not we will reimburse him shortly thereafter" policy which
18 Nissan has adopted. It is Plaintiff's position that under federal and Guam law, fluctuating and
19 uncertain commissions are not counted towards the \$455 per week threshold. To meet said
20 threshold amount, the \$455 salary must be guaranteed. It must be a fixed and predetermined
21 amount, and free and clear. Plaintiff contends that commissions do not qualify as fixed
22 predetermined amounts that are paid free and clear because they are subject to variations based
23 upon the quality or quantity of the work performed.

24 29 C.F.R. § 541.602(a) provides:

25 (a) General rule. An employee will be considered to be paid on a "salary basis"
26 within the meaning of these regulations if the employee regularly receives each
27 pay period on a weekly, or less frequent basis, **a predetermined amount**
28 **constituting all or part of the employee's compensation, which amount**
 is not subject to reduction because of variations in the quality or
 quantity of the work performed. Subject to the exceptions provided in
 paragraph (b) of this section, an exempt employee must receive the full salary
 for any week in which the employee performs any work without regard to
 the number of days or hours worked. Exempt employees need not be paid for

1 any workweek in which they perform no work. An employee is not paid on a
2 salary basis if deductions from the employee's predetermined compensation
3 are made for absences occasioned by the employer or by the operating
requirements of the business. If the employee is ready, willing and able to
work, deductions may not be made for time when work is not available.

4 Has Nissan satisfied summary judgment standards? In determining whether Nissan is
5 entitled to summary judgment, the court notes Nissan must show that Plaintiff's employment was
6 truly as an executive performing functions as an executive employee under the company's
7 umbrella and that he was paid the requisite salary provided under the statute.

8 Nissan argues that Plaintiff was an executive employee because he regularly supervised
9 eight to ten individuals in the Parts Department; his job description and managerial duties
10 illustrated he had a leadership position within Defendant's employment; and he made
11 recommendations as to hiring, firing, and promotions for the company.

12 The court notes that federal regulations which interpret whether an employee functions as
13 an executive employee have other guidelines which appear to require a fact finding by the trier of
14 fact.

15 For example, in order to determine whether an employee suggestions and
16 recommendations are given "particular weight", 29 C.F.R. § 541.105 provides:

17 To determine whether an employee's suggestions and recommendations
18 are given "particular weight," factors to be considered include, but are not
19 limited to, whether it is part of the employee's job duties to make such
20 suggestions and recommendations; the frequency with which such suggestions
21 and recommendations are made or requested; and the frequency with which
22 the employee's suggestions and recommendations are relied upon. Generally,
23 an executive's suggestions and recommendations must pertain to employees
24 whom the executive customarily and regularly directs. It does not include an
occasional suggestion with regard to the change in status of a co-worker.
An employee's suggestions and recommendations may still be deemed to
have "particular weight" even if a higher level manager's recommendation
has more importance and even if the employee does not have authority to
make the ultimate decision as to the employee's change in status.

25 As further examples, federal regulations provide guidelines as to the general rules for
26 administrative employees (29 C.F.R. § 541.200), whether an employee's work is directly related
27 to management or general business operations (29 C.F.R. § 541.201), primary duty
28 considerations (29 C.F.R. § 541.700), and concurrent duties (29 C.F.R. § 541.106).

Whether or not Plaintiff qualifies for work that is directly related the management or

1 general business of Defendant, 29 C.F.R. § 201 provides:

2 (a) To qualify for the administrative exemption, an employee's primary duty
3 must be the performance of work directly related to the management or general
4 business operations of the employer or the employer's customers. The phrase
5 "directly related to the management or general business operations" refers to
6 the type of work performed by the employee. To meet this requirement, an
employee must perform work directly related to assisting with the running or
servicing of the business, as distinguished, for example, from working on a
manufacturing production line or selling a product in a retail or service
establishment.

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8 (b) Work directly related to management or general business operations includes,
but is not limited to, work in functional areas such as tax; finance; accounting;
9 budgeting; auditing; insurance; quality control; purchasing; procurement;
10 advertising; marketing; research; safety and health; personnel management;
human resources; employee benefits; labor relations; public relations, government
11 relations; computer network, internet and database administration; legal and
regulatory compliance; and similar activities. Some of these activities may be
performed by employees who also would qualify for another exemption.

12 (c) An employee may qualify for the administrative exemption if the employee's
13 primary duty is the performance of work directly related to the management or
14 general business operations of the employer's customers. Thus, for example,
employees acting as advisers or consultants to their employer's clients or
customers (as tax experts or financial consultants, for example) may be exempt.

15 An important factor in determining whether Plaintiff is an executive employee centers on
16 the question of his primary job duty. 29 C.F.R. § 541.700 provides:

17 (a) To qualify for exemption under this part, an employee's "primary duty" must
18 be the performance of exempt work. The term "primary duty" means the principal,
main, major or most important duty that the employee performs. Determination of an
19 employee's primary duty must be based on all the facts in a particular case, with the
major emphasis on the character of the employee's job as a whole. Factors to consider
20 when determining the primary duty of an employee include, but are not limited to, the
relative importance of the exempt duties as compared with other types of duties; the
21 amount of time spent performing exempt work; the employee's relative freedom from
direct supervision; and the relationship between the employee's salary and the wages
22 paid to other employees for the kind of nonexempt work performed by the employee.

23 (b) The amount of time spent performing exempt work can be a useful guide in
determining whether exempt work is the primary duty of an employee. Thus,
24 employees who spend more than 50 percent of their time performing exempt work
will generally satisfy the primary duty requirement. Time alone, however, is not
25 the sole test, and nothing in this section requires that exempt employees spend
more than 50 percent of their time performing exempt work. Employees who do
26 not spend more than 50 percent of their time performing exempt duties may
nonetheless meet the primary duty requirement if the other factors support such
27 a conclusion.

28 (c) Thus, for example, assistant managers in a retail establishment who perform
exempt executive work such as supervising and directing the work of other
employees, ordering merchandise, managing the budget and authorizing payment
of bills may have management as their primary duty even if the assistant managers

1 spend more than 50 percent of the time performing nonexempt work such as running
2 the cash register. However, if such assistant managers are closely supervised and
3 earn little more than the nonexempt employees, the assistant managers generally
4 would not satisfy the primary duty requirement.

5 As seen in the regulations above, whether or nor Plaintiff is a bona fide executive
6 employee is a fact intensive process. His primary duty is based upon all of the facts in the case.
7 See 29 C.F.R. § 541.700. Whether or not his suggestions or recommendations are given weight
8 also requires more facts to be developed. See 29 C.F.R. § 541.105.

9 Thus, based upon all of the above, the court finds that summary judgment on the basis
10 that Plaintiff is exempt from the application of the Fair Labor Standards Act because he is a bona
11 fide executive employee of Nissan is inappropriate at this time. Summary judgment is
12 appropriate when the facts are not in dispute. In this instance, Plaintiff disputes his salary
13 computation as Nissan asserts that it is. Likewise, whether Plaintiff is indeed a bona fide
14 executive employee is a factual determination that must be determined at trial based upon the
15 aforesaid regulations and not at this stage of the proceedings.

16 **Summary Judgment that Nissan did not wilfully or recklessly withhold employer
17 contributions into Plaintiff's 401K plan.**

18 Nissan argues that Plaintiff has not met his burden of showing that Nissan's failure to
19 initially provide him with the correct employer contributions into his 401K plan was willful or in
20 reckless disregard of its obligations. Nissan states that Plaintiff in the Complaint simply alleges
21 that "Untalan's 401K benefits were withheld from the amount that he received in his pension
22 plan" and that "Nissan willfully or recklessly violated the rules and regulations of employee
23 pension benefit plans under USERRA." ECF No. 1. He then alleges in his deposition that in
24 2017, he raised this issue with E.J. Quintanilla, and when he was informed that he was not
25 entitled to these benefits, he filed a Complaint with ESGR. Depo. Tr. Nathaniel B. Untalan, ECF
26 No. 29 at 40. Nissan unequivocally states that when Plaintiff initially brought this issue to Mr.
27 Quintanilla's attention, Mr. Quintanilla was under the good faith belief that Nissan had paid him
28 the correct benefits and that Nissan was not violating any laws. It was only after speaking with
the ESGR representative that Mr. Quintanilla was on notice that something could be awry. So,

1 he immediately sought clarification from Ms. Bamba at ASC Trust. She first provided him with
2 information that confirmed his stance, but then after additional research, she contacted him
3 approximately one week later and provided him with the correct information as it relates to
4 military service members. Upon receipt of this information, Nissan's Controller immediately
5 calculated the amount of employer contribution due and forwarded it to ASC Trust. Nissan
6 concludes that based upon the court's holding in *Reed v. Honeywell Int'l. Inc.*, Nissan's initial
7 error as to its compliance requirements and its consultation with ASC in an attempt to comply
8 with USERRA is not evidence of willfulness.

9 In Opposition, Plaintiff argues that triable issues of fact remain as to whether Nissan's
10 acts were wilful. Questions remain as to Nissan's intentions and motivations for allegedly
11 violating Plaintiff's USERRA rights by withholding 401K contributions, failing to reinstate his
12 health insurance immediately, and making "illegal" deductions from his salary.

13 Plaintiff points out that he met with Mr. Quintanilla in July, 2017 regarding his 401K
14 account and filed his ESGR complaint at least by mid-July. Mr. Quintanilla did not do anything
15 about the complaint until he contacted Gaby Bamba on August 30, 2017. Mr. Quintanilla states
16 in his affidavit of June 12, 2019 (ECF No. 20-4) that on September 6, 2017, Ms. Bamba
17 contacted him by email and advised him that she had failed to provide him with rules specific to
18 military service members and USERRA. Ms. Bamba later provided him with the information
19 and eventually Mr. Quintanilla provided the information to the company controller, who
20 immediately calculated the amount due to Plaintiff for the past years when he was on military
21 leave. A check in the amount of \$1,467.39 was issued to ASC Trust. Mr. Quintanilla fails to
22 state when the money was paid and what past year amounts they were for.

23 22 GCA § 3219 provides penalties for employers who fail to pay wages when due or who
24 underpay employees, unless the employer can establish an affirmative defense. Damages are
25 assessed as punitive damages which is equal to three times the wages due. Section 3219(a)(8)
26 provides: "(8) In the case of an underpayment, the underpayment was a good faith effort error
27 with no intent to defraud."

28 In this case, there has been an acknowledgment of an underpayment by Nissan in relation

1 to Plaintiff's 401K, where Nissan has admitted that it has now correctly calculated the amounts
2 due him for past years he was on military leave. Nissan asserts that the underpayment for past
3 years Plaintiff was on military leave was a good faith error with no intent to defraud. Plaintiff
4 disputes Nissan's good faith assertions.

5 After having weighed the above contentions and the facts as represented therein, the court
6 agrees with Plaintiff that there remain triable issues of facts to be determined whether Nissan's
7 acts were made in good faith error and with no intent to defraud.

8 **Summary Judgment on the claim that Plaintiff is entitled to reimbursement for**
9 **medical and dental premiums for the period of June 1, 2017 to July 31, 2017.**

10 With respect to this claim, Nissan asserts that it has now paid all medical and dental
11 premiums to Plaintiff for the periods from June 1, 2017 to July 31, 2017 and can be granted
12 summary judgment inasmuch as there are no amounts left to be paid.

13 It appears to the court that Plaintiff's position with respect to this issue is that assuming
14 the reimbursements have indeed been all paid, there still remains the issue regarding penalties for
15 a failure to pay which are subject to the affirmative defenses under 22 GCA § 3219.

16 With regard to this issue, the court agrees in part with Nissan that it should be entitled to
17 summary judgment solely to the issue that there are no further reimbursements due to Plaintiff
18 for medical and dental premiums for the period from June 1, 2017 to July 31, 2017. However,
19 the court also agrees with Plaintiff that there still remains the issue whether Nissan is subject to
20 the penalties provided for under 22 GCA § 3219 for the failure to pay when due the amounts
21 therein. Such an inquiry is appropriate for trial and is thus inappropriate for summary judgment.

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1 **RECOMMENDATION**

2 IT THEREFORE IS RECOMMENDED that the District Court issue an order as follows:

3 That the motion for partial summary judgment be denied except as to the claim **that**
4 **Plaintiff is not entitled to any further reimbursement for medical and dental premiums for**
5 **the period of June 1, 2017 to July 31, 2017.**

6 IT IS SO RECOMMENDED.



/s/ Joaquin V.E. Manibusan, Jr.
U.S. Magistrate Judge
Dated: Oct 11, 2019

10 **NOTICE**

11 **Failure to file written objections to this Report and Recommendation within**
12 **fourteen (14) days from the date of its service shall bar an aggrieved party**
13 **from attacking such Report and Recommendation before the assigned United**
14 **States District Judge. 28 U.S.C. § 636(b)(1)(B).**
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